

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Notice of)	
Election of ALLTEL Missouri, Inc.)	
To Be Price Cap Regulated Under)	Case No. IO-2002-1083
Section 392.245, RSMo. 2000.)	

**INITIAL BRIEF

OF

ALLTEL MISSOURI, INC.**

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COMES NOW ALLTEL Missouri, Inc. (ALLTEL), pursuant to the Missouri Public Service Commission's ("Commission") *Order Adopting Proposed Procedural Schedule and Setting Date for Oral Arguments* issued on February 24, 2004, and respectfully submits its Initial Brief in this matter.

Introduction and Procedural History

On May 17, 2002, ALLTEL filed its verified Notice of Election To Be Price Cap Regulated Under Section 392.245, RSMo 2000¹ ("Notice of Election"). As fully set forth in the Notice of Election, ALLTEL advised the Commission: (1) that it is a "small local exchange telecommunications company," as defined by Section 386.020(30), serving less than one hundred thousand (100,000) access lines in Missouri; (2) that Universal Telecom, Inc. ("Universal") and Missouri State Discount Telephone ("MSDT"), both alternative local exchange telecommunications companies as defined in Section 386.020(1), had been granted certificates of service authority to provide basic local exchange telecommunications services in exchanges served by various local exchange companies, including ALLTEL; and (3) that both Universal and MSDT, as explained in the sworn affidavit of an officer of ALLTEL attached to the Notice of Election, were, in fact, currently providing basic local exchange service in ALLTEL's service area in Missouri. The verified Notice of Election, in addition to

ⁱ All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted.

the above-referenced affidavit, included copies of the Commission's Orders granting certificates to provide basic local exchange service for both Universal and MSDT.²

ALLTEL further advised the Commission that it was exercising its statutory right to elect to be regulated under Section 392.245 by providing written notice to the Commission, in conformance with Section 392.245(2), which states:

A large incumbent local exchange telecommunications company shall be subject to regulation under this section upon a determination by the commission that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent company's service area. A small incumbent local exchange telecommunications company may elect to be regulated under this section upon providing written notice to the commission if an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the small incumbent company's service area, and the incumbent company shall remain subject to regulation under this section after such election. (emphasis added.)

ALLTEL stated that it will remain subject to regulation under Section 392.245 after the filing of the Notice of Election and that no further action of the Commission was required to effectuate ALLTEL's election.

On June 6, 2002, the Staff of the Commission filed its Motion To Reject ALLTEL's Price Cap Election ("Staff Motion") in which it requested the Commission to reject ALLTEL's notice of price cap election and suggested two reasons why it believes the election is invalid: (1) that the existence of a reseller of basic local telecommunications service in an incumbent local exchange carrier's service area should not be used as a basis for acquiring price cap regulated status under the election provisions of Section 392.245.2 RSMo 2000; and

² Universal: *Order Granting Certificate To Provide Basic Local Exchange Service*, Case No. TA-2002-183, attached to the Notice as Appendix 1; MSDT: *Order Granting Certificate To Provide Basic Local Exchange and Interexchange Telecommunications Service*, Case No. TA-2001-334, attached to the Notice as Appendix 2.

(2) that neither Universal or MSDT is providing basic local telecommunications service under Commission rules.

ALLTEL filed Suggestions in Opposition on June 17, 2002 and, recognizing that the matter was now at issue, on June 21, 2002 the Commission issued its *Order Setting Prehearing Conference and Requiring Filing of Procedural Schedule*.

ALLTEL, Staff and the Office of the Public Counsel (“OPC”) (collectively “the Parties”) appeared and participated at the Prehearing Conference held on July 1, 2002 and, as a result of discussions regarding both procedural and substantive matters in this and other pending Commission proceedings, agreed that the filing of a proposed procedural schedule in this matter should be suspended until a date certain. At that time, other proceedings included *Staff of the Missouri Public Service Commission v. BPS Telephone Company*, Case No. TC-2002-1076 and *In the Matter of the Investigation of the Status of Prepaid Local Service Providers As Alternative Local Exchange Competitors Under Section 392.245, RSMo.*, Case No. CO-2002-1078. Shortly thereafter, the Commission issued its Notice concerning *In the Matter of BPS Telephone Company’s Election to be Regulated under Price Regulation as Provided in Section 392.245, RSMo 2000 (“BPS”)*, Case No. IO-2003-0012.

In the interest of judicial economy, ALLTEL, Staff and OPC filed several joint motions to continue the suspension of a procedural schedule in this matter, during the pendency of *BPS*, Case No. IO-2003-0012. The Commission issued its Report and Order in the *BPS* case on November 14, 2003, and issued its Order Denying Rehearing on December 30, 2003. As set forth in their Joint Motion to Schedule Prehearing Conference filed by the Parties in this matter on January 15, 2004, the issues in the *BPS* case are similar to the issues in the ALLTEL case; however, factual distinctions exist. ALLTEL will address these significant factual distinctions below. At the Prehearing Conference held on January 26,

2004, the Parties agreed to file a stipulation of facts, in lieu of testimony. On February 20, 2004, the Parties filed their Joint Response to Order Granting Extension of Time, which included their Stipulation of Facts (attached as Attachment 1 to that pleading), a proposed briefing schedule and a proposed date for oral argument. The proposed dates were adopted by the Commission in its February 24, 2004 *Order, supra*.

The Three Pending Cases

A. Case No. IO-2003-0012

As discussed, *supra*, the Commission issued its Report and Order in the *BPS* price cap election case, Case No. IO-2003-0012, on November 13, 2003. Among the Conclusions of Law adopted by the Commission:

Section 392.245 authorizes the Commission to "ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation." Section 392.245.2 sets out the procedure for small incumbent local exchange companies to elect to be regulated pursuant to the price cap statute and states, in pertinent part, that:

A small incumbent local exchange telecommunications company may elect to be regulated under this section upon providing written notice to the commission if an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the small incumbent company's service area

An "alternative local exchange telecommunications company" is defined as "a local exchange telecommunications company certified by the commission to provide basic or nonbasic local telecommunications service. . . in a specific geographic area."³ MSDT was certificated to provide basic local telecommunications service in Case No. TA-2001-334, effective March 26, 2001. A telecommunications company is required to specify in which exchanges it will provide service.⁴ As of June 21, 2002, MSDT's tariff specified that it would provide service in BPS's service area. BPS also has provided written notice of its election to be regulated pursuant to the price cap statute on March 13, 2002, and again on July 17, 2002.

³ Section 386.020(1), RSMo.

⁴ Section 392.220.1, RSMo. *See also*, 4 CSR 240-3.545(12)(C) (this rule was formerly 4 CSR 240-30.010(12)(C) but was relocated within the Code of State Regulations effective April 30, 2003).

Thus, BPS has shown all the required elements of Section 392.245.2 except that MSDT is providing basic local telecommunications service in competition with BPS. (Order at 8-9).

The critical finding and conclusion reached by the Commission in the *BPS* case focused on the Resale Agreement entered into by BPS and MSDT that included the following restriction on service to be provided by MSDT:

6.1 Restrictions.

6.1.1 The resale of services under this Agreement shall be limited to users and uses conforming to class of service restrictions. All services provided under this Agreement shall be toll restricted, so that the services cannot be used to incur direct dial toll charges. . . . Missouri State Discount shall not target Telephone Company's current customers or new customers to Telephone Company's service area, for services to be resold by Missouri State Discount. Missouri State Discount's target market shall be individuals and entities which are not current customers of Telephone Company and have been disconnected for nonpayment of Telephone Company's telecommunication charges. . . .⁵ (Order at 6).

Essentially, the Commission construed the above paragraph to mean that “MSDT and BPS have entered into a contract by which MSDT agrees not to compete with BPS and BPS is not subject to any competition from MSDT. . . . For these reasons, the Commission determines that BPS is not eligible for price cap status and that its price cap election is invalid.” (Order at 12).

B. Case No. TC-2002-1076

On January 13, 2004, the Commission directed the parties to this case to file a status report no later than February 13, 2004, in order to advise the Commission as to whether it should resume the complaint case and whether the parties intended to pursue the issues previously raised.

⁵ Shown as Footnote 12 in Report and Order, referencing Resale Agreement Exhibit.

On February 10, 2004, the Staff of the Commission filed its Status Report in which it advised the Commission of the Writ of Review filed by BPS in the Cole County Circuit Court seeking review of Commission Case No. IO-2003-0012 regarding its election of price cap status. The Staff also advised the Commission that BPS and Missouri State Discount Telephone had filed an amendment to the Resale Agreement between the parties removing the text regarding MSDT's targeting of BPS customers. The Staff recommended that the Commission enter an Order holding this case in abeyance until the status of BPS's price cap election is finally determined through the appeals process. On February 13, 2004, BPS filed its Concurrence in Staff's Status Report, concurring with the Staff's recitation of the current status of the proceeding as well as Staff's recommendation that Case No. TC-2002-1076 be held in abeyance until the status of BPS's price cap election is finally determined through the appeals process.

C. Case No. CO-2002-1078

On March 5, 2004, the Commission issued its *Order Denying Motion to Investigate Competition of Prepaid and Resold Services*, wherein the Commission denied the motion of the Office of the Public Counsel to open a generic investigation into the status of competition of prepaid and resold telecommunications service providers for the purposes of small company price cap election.

The issue of whether a prepaid reseller of telecommunications services provides competition sufficient to allow election of price cap status was an issue in the *BPS Telephone Company* price cap case.⁶ The Commission decided to postpone a decision in the current case until after a decision in the *BPS* case. **The Commission ultimately decided that BPS was not price cap eligible because of the noncompete clause in BPS's interconnection agreement with Missouri State Discount Telephone Company.** The Commission did not decide the issue of whether MSDT as a reseller or prepaid

⁶ Case No. IO-2003-0012.

provider could provide competition for purposes of price cap election. The *BPS* case is currently being appealed to the Cole County Circuit Court.⁷

ALLTEL has also filed a notice of election to be regulated as a price cap company. That case is currently pending in Case No. IO-2002-1083. **ALLTEL does not have a noncompete clause in its interconnection agreement, but is electing price cap status based on competition from a reseller. Thus, the major subject of the proposed investigation is pending before the Commission.**

The Commission has authority under its general jurisdiction and supervision statutes⁸ to conduct this type of investigation. The Commission determines, however, that because a case that may be resolved on specific facts is pending before the Commission, it would be duplicative to proceed with a generic investigation to set a Commission policy that may not be binding on the parties, nor on any future Commission. **The Commission has not had an avalanche of cases regarding small company price cap elections, as was anticipated by Public Counsel and Staff when proposing that the investigation be conducted.** Thus, the Commission finds that no generic investigation of this matter is necessary at this time and the motions to conduct an investigation should be denied. (Order at 2-3). (emphasis added).

Statement of Facts

The Parties, pursuant to Commission Rule 4 CSR 240-2.130(9), have stipulated as to the following facts to be received into evidence in this matter⁹:

1. ALLTEL is a small incumbent local exchange company serving approximately 69,000 access lines in Missouri.
2. On May 17, 2002, ALLTEL filed its Notice of Election To Be Price Cap Regulated Under Section 392.245, RSMo 2000, with the Commission.
3. Universal Telecom, Inc. (Universal) is an alternative local exchange telecommunications company as that term is used in § 392.245 and defined in § 386.020 (1), RSMo 2000.

⁷ *State ex rel. BPS Telephone Company v. Missouri Public Service Commission*, 19th Judicial Circuit, Case Number 04CV323251 (filed January 27, 2004).

⁸ Sections 386.250(2) and 386.320, RSMo.

⁹ Stipulation of Facts, submitted as Attachment 1 to Joint Response to Order Granting Extension of Time filed in this matter on February 20, 2004.

4. On March 21, 2002, Universal was granted a certificate of service authority to provide basic local exchange telecommunications services in exchanges served by various local exchange companies, including ALLTEL. (*Order Granting Certificate To Provide Basic Local Exchange Service*, Case No. TA-2002-183, effective March 31, 2002).

5. On January 22, 2001, the Commission approved the Interconnection Agreement between Universal and ALLTEL in Case No. TO-2001-360. (*Order Approving Interconnection Agreement*, effective February 1, 2001). The subject Interconnection Agreement does not contain a restriction on service to be provided by Universal, such as that found in the Resale Agreement between BPS Telephone Company and Missouri State Discount Telephone, as discussed in Case No. IO-2003-0012.¹⁰

6. At the time of the Notice of Election, Universal provided telecommunications service to customers within the ALLTEL service area, pursuant to its lawfully approved tariff. (Universal Telecom, Inc. P.S.C. Mo. Tariff No. 1).

7. Universal provides “two-way switched voice service within a local calling scope as determined by the commission” comprised of the following services:

- (a) Multiparty, single line, including installation, touchtone dialing and any applicable mileage or zone charges.

¹⁰ **6.1 Restrictions.**

6.1.1 The resale of services under this Agreement shall be limited to users and uses conforming to class of service restrictions. . . . Missouri State Discount shall not target Telephone Company's current customers or new customers to Telephone Company's service area, for services to be resold by Missouri State Discount. Missouri State Discount's target market shall be individuals and entities which are not current customers of Telephone Company and have been disconnected for nonpayment of Telephone Company's telecommunication charges. . . (*Report and Order*, Case No. IO-2003-0012, November 13, 2003, p. 6).

- (b) Access to local emergency services including, but not limited to, 911 service established by local authorities.
- (c) Standard intercept service.
- (d) One standard white pages directory listing.

Universal does not provide:

- (a) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired or speech impaired.
- (b) Access to basic local operator services.
- (c) Access to basic local directory assistance.
- (d) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission.
- (e) Equal access in the sense of dialing parity and presubscription among interexchange telecommunications companies for calling within and between local access and transport areas (intraLATA and interLATA presubscription).

8. Missouri State Discount Telephone (MSDT) is an alternative local exchange telecommunications company as that term is used in § 392.245 and defined in § 386.020 (1), RSMo 2000.

9. On March 16, 2001, MSDT was granted a certificate of service authority to provide basic local exchange telecommunications services in exchanges served by various local exchange companies, including ALLTEL. (*Order Granting Certificate To Provide*

Basic Local Exchange And Interexchange Telecommunications Service, Case No. TA-2001-334).

10. On April 24, 2000, the Commission approved the Interconnection Agreement between MSDT and ALLTEL in Case No. TO-2000-469. (*Order Approving Interconnection Agreement*, effective May 2, 2000). The subject Interconnection Agreement does not contain a restriction on service to be provided by MSDT, such as that found in the Resale Agreement between BPS Telephone Company and Missouri State Discount Telephone, as discussed in Case No. IO-2003-0012.¹¹

11. At the time of the Notice of Election, MSDT provided telecommunications service to customers within the ALLTEL service area, pursuant to its lawfully approved tariff. (Missouri State Discount Telephone, P.S.C. No. 1).

12. MSDT provides “two-way switched voice service within a local calling scope as determined by the commission” comprised of the following services:

- (a) Multiparty, single line, including installation, touchtone dialing and any applicable mileage or zone charges.
- (b) Access to local emergency services including, but not limited to, 911 service established by local authorities.
- (c) Standard intercept service.
- (d) One standard white pages directory listing.

MSDT does not provide:

- (a) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and

¹¹ *Id.*

link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired or speech impaired.

- (b) Access to basic local operator services.
- (c) Access to basic local directory assistance.
- (d) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission.
- (e) Equal access in the sense of dialing parity and presubscription among interexchange telecommunications companies for calling within and between local access and transport areas (intraLATA and interLATA presubscription).

13. The parties do not agree as to which, if any, Commission rules are relevant to a decision in this case, but the parties agree that the Commission may take official notice of Commission rules, tariffs, orders, and any other information contained in a document on file as a public record with the Commission in its decision in this case, subject to the relevance and materiality provisions of 4 CSR 240-2.130(2).

In addition to the Stipulated Facts, ALLTEL would direct the Commission to the sworn Affidavit and Verification of Steve R. Mowery, Vice President, State Government Affairs for ALLTEL, attached as Appendix 3 and incorporated by reference to ALLTEL's Notice of Election, which provides that at the time of the Notice of Election both Missouri State Discount Telephone and Universal Telecom, as certificated alternative local exchange telecommunications companies, were providing basic local telecommunications service on a resale basis to customers in ALLTEL Missouri, Inc.'s local service area as follows:

Universal: the ALLTEL Missouri, Inc. exchanges of Aldrich, Bolivar, Crocker, Dixon, Gallatin, Halfway, Madison, Morrisville, Polk, Purdy and Winston.

MSDT: the ALLTEL Missouri, Inc. exchange of Myrtle.

Argument

ALLTEL exercised its statutory right to elect to be price cap regulated under Section 392.245, RSMo 2000, by providing written notice to the Commission in conformance with Section 392.245(2), which states:

A large incumbent local exchange telecommunications company shall be subject to regulation under this section upon a determination by the commission that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent company's service area. A small incumbent local exchange telecommunications company may elect to be regulated under this section upon providing written notice to the commission if an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the small incumbent company's service area, and the incumbent company shall remain subject to regulation under this section after such election. (*emphasis added.*)

An examination of the stipulated facts relative to the above-stated statutory provision, reveals the following in regard to the conditions that a carrier must meet:

- A. ALLTEL is a small incumbent local exchange telecommunications company.
ALLTEL is a small incumbent local exchange company serving approximately 69,000 access lines in Missouri.
- B. ALLTEL provided written notice of its election to the Commission. On May 17, 2002, ALLTEL filed its Notice of Election To Be Price Cap Regulated Under Section 392.245, RSMo 2000, with the Commission.
- C. An alternative local exchange carrier, in this case both Universal and MSDT, has been certified to provide basic local telecommunications service in ALLTEL's service area. Universal Telecom, Inc. (Universal) is an alternative local exchange telecommunications company as that term is used in § 392.245 and defined in § 386.020 (1), RSMo 2000. On March 21, 2002, Universal was granted a certificate of service authority to

provide basic local exchange telecommunications services in exchanges served by various local exchange companies, including ALLTEL. (*Order Granting Certificate To Provide Basic Local Exchange Service*, Case No. TA-2002-183, effective March 31, 2002).

Missouri State Discount Telephone (MSDT) is an alternative local exchange telecommunications company as that term is used in § 392.245 and defined in § 386.020 (1), RSMo 2000. On March 16, 2001, MSDT was granted a certificate of service authority to provide basic local exchange telecommunications services in exchanges served by various local exchange companies, including ALLTEL. (*Order Granting Certificate To Provide Basic Local Exchange And Interexchange Telecommunications Service*, Case No. TA-2001-334).

D. An alternative local exchange telecommunications company, in this case both Universal and MSDT, is providing such service in any part of ALLTEL's service area. On January 22, 2001, the Commission approved the Interconnection Agreement between Universal and ALLTEL in Case No. TO-2001-360. (*Order Approving Interconnection Agreement*, effective February 1, 2001). The subject Interconnection Agreement does not contain a restriction on service to be provided by Universal, such as that found in the Resale Agreement between BPS Telephone Company and Missouri State Discount Telephone, as discussed in Case No. IO-2003-0012. At the time of the Notice of Election, Universal provided telecommunications service to customers within the ALLTEL service area, pursuant to its lawfully approved tariff. (Universal Telecom, Inc. P.S.C. Mo. Tariff No. 1).

On April 24, 2000, the Commission approved the Interconnection Agreement between MSDT and ALLTEL in Case No. TO-2000-469. (*Order Approving Interconnection Agreement*, effective May 2, 2000). The subject Interconnection Agreement does not contain a restriction on service to be provided by MSDT, such as that found in the Resale Agreement

between BPS Telephone Company and Missouri State Discount Telephone, as discussed in Case No. IO-2003-0012. At the time of the Notice of Election, MSDT provided telecommunications service to customers within the ALLTEL service area, pursuant to its lawfully approved tariff. (Missouri State Discount Telephone, P.S.C. No. 1).

While ALLTEL has not had the benefit of prefiled testimony or statements of position to discern the advocacy positions that Staff and OPC may take in this matter, Staff's Motion represents an attempt to obfuscate the plain meaning of the statute, in contravention of Staff's prior position in other price cap cases as well as the decisions of this Commission and the Cole County Circuit Court, to serve its purposes of denying price cap status to ALLTEL as a small incumbent local exchange telecommunications company.

It is clear from Staff's Motion that Staff intends to interject the argument that neither Universal nor MSDT are providing basic local telecommunications service, in that the service the carriers provide does not constitute minimum basic local telecommunications service under Commission rules. Staff asserts that because both companies' tariffs are toll restricted (tariffs that had to have a positive Staff Recommendation to obtain approval), there is not equal access to interexchange carriers.

However, Staff is proposing a standard not consistent with the plain reading of the price cap statute and the standard definition of "basic local telecommunications service." The Staff cites 4 CSR 240-32.100(2)(G) for the proposition of what constitutes minimum basic local telecommunications service; but the controlling definition of "basic local telecommunications service" is found in Section 386.020(4), where "basic local telecommunications service" is defined as:

(4) "Basic local telecommunications service", two-way switched voice service within a local calling scope as determined by the commission comprised of **any** of the following services and their recurring and nonrecurring charges:

- (a) Multiparty, single line, including installation, touchtone dialing, and any applicable mileage or zone charges;
- (b) Assistance programs for installation of, or access to, basic local telecommunications services for qualifying economically disadvantaged or disabled customers or both, including, but not limited to, lifeline services and link-up Missouri services for low-income customers or dual-party relay service for the hearing impaired and speech impaired;
- (c) Access to local emergency services including, but not limited to, 911 service established by local authorities;
- (d) Access to basic local operator services;
- (e) Access to basic local directory assistance;
- (f) Standard intercept service;
- (g) Equal access to interexchange carriers consistent with rules and regulations of the Federal Communications Commission;
- (h) One standard white pages directory listing.

Basic local telecommunications service does not include optional toll free calling outside a local calling scope but within a community of interest, available for an additional monthly fee or the offering or provision of basic local telecommunications service at private shared-tenant service locations; (Emphasis added.)

Both carriers provide many of these services, and thus provide basic local telecommunications service under the applicable statutory definition. As the stipulated facts reveal:

Universal provides “two-way switched voice service within a local calling scope as determined by the commission” comprised of the following services:

- (a) Multiparty, single line, including installation, touchtone dialing and any applicable mileage or zone charges.
- (b) Access to local emergency services including, but not limited to, 911 service established by local authorities.
- (c) Standard intercept service.
- (d) One standard white pages directory listing.

MSDT provides “two-way switched voice service within a local calling scope as determined by the commission” comprised of the following services:

- (a) Multiparty, single line, including installation, touchtone dialing and any applicable mileage or zone charges.
- (b) Access to local emergency services including, but not limited to, 911 service established by local authorities.
- (c) Standard intercept service.
- (d) One standard white pages directory listing

Section 386.020(4) states that basic local telecommunications service is two-way switched voice service comprised of *any* of the listed services, it does not say *all* of these services. Thus, Universal’s and MSDT’s services clearly meets this definition as they each provide at least four (4) of the listed services.

Indeed, the very Chapter of the Commission’s Rules that the Staff cites, Chapter 32, specifically refers to the above statutory definition for “basic local telecommunications service”: 4 CSR 240-32.020 Definitions, (5) Basic local telecommunications service – basic local telecommunications service **as defined in section 386.020(4)**, RSMo Supp. 1997 (Emphasis added; of course, the supplement has been updated to RSMo 2000).

In its Motion, Staff undertakes a strained statutory construction, completely contrary to the plain language and plain meaning of Section 392.245.2, by suggesting that because Section 392.450.1 refers to a certificate of local exchange authority “to provide basic local telecommunications service or for the resale of basic local telecommunications service,” there are two types of certificates.¹² Following Staff’s argument, “since the price cap statute does not include or mention the resale of telecommunications service, the company’s election to

¹² Staff Motion, Par. 5, p. 2.

price cap status based on the existence of a reseller in part of its service area was ineffective.”¹³

First, as noted above, the language of Section 392.245.2 regarding a small incumbent local exchange company’s qualification for price cap status is very clear, to-wit: “an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the small incumbent company’s service area . . .” *Id.*¹⁴ Where the language of the statutory provision is clear and unambiguous, the rules of statutory construction do not apply.¹⁵ In *Dueker v. Missouri Div. of Family Services*, 841 S.W.2d 772, 775 (Mo. App. E.D. 1992), the court held that “the legislature is presumed to have intended what a statute says directly.” The legislature expressed its intent in the plain language of the statute, and there is no need to seek any other meaning through statutory construction.

Second, while Staff acknowledges that prior Commission precedent specifically holds that price cap status should be granted on the basis that an alternative local exchange telecommunications company is providing basic local telecommunications service *on a resale basis* to customers within an incumbent local exchange company’s service area,¹⁶ it fails to point out that the Commission fully addressed the issue of statutory construction of Section 392.245 in the first petition for price cap regulation filed by Southwestern Bell Telephone

¹³ *Id.*, Par. 6, pp. 2-3.

¹⁴ ALLTEL Notice of Election, p. 3.

¹⁵ *Brownstein v. Rhomberg-Haglin and Associates, Inc.*, 824 S.W.2d 13, 15 (Mo. banc 1992).

¹⁶ *In the Matter of the Petition of GTE Midwest Inc. Regarding Price Cap Regulation under RSMo Section 392.245 (1996)*, Case No. TO-99-294, (“GTE Price Cap Case”) and *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that It is Subject to Price Cap Regulation under Section 392.245, RSMo Supp. 1996*, Case No. TO-97-397, (“Southwestern Bell Price Cap Case”). Staff Motion, Par. 7, p. 3.

Company.¹⁷ In the Southwestern Bell Price Cap Case, the Commission stated “the Commission finds nothing in either [Section 392.245.2 or Senate Bill 507] which would create an ambiguity in Section 392.245.2 . . .” The Commission further stated, “The plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in a statute’s clear and unambiguous language. Thus, the parties’ attempt to create ambiguity where none exists must fail.”¹⁸

At page 3 of its Motion, Staff cites a portion of the language of the Cole County Circuit Court’s Judgment affirming the Commission’s Report and Order in Case No. TO-97-397, to the effect that it might be possible to distinguish a reseller from a facilities-based company for purposes of price cap determination. However, the Circuit Court affirmed the decision of the Commission granting price cap status to Southwestern Bell based on the existence of one reseller, and the Commission did not change its decision regarding Southwestern Bell’s qualification for price cap status after the Circuit Court’s decision, nor did the Commission adopt this position in either the Sprint or GTE price cap cases.¹⁹ The Commission noted the language from the Circuit Court decision cited by Staff in the GTE decision, but found that GTE had met the prerequisites for price cap regulation through competition from one reseller.²⁰

Third, the Commission has never made any distinction between facilities-based providers and resellers in the certificates of service authority granted to competitive local exchange telecommunications providers. As reflected in the Order Granting Certificate To

¹⁷ Southwestern Bell Price Cap Case. This decision may be found at 6 Mo.P.S.C. 3d 493, 503 (1997).

¹⁸ *Id.* at 506, citing *State ex rel. Doe Run v. Brown*, 918 S.W. 2d 303,306 (Mo. App. 1996).

¹⁹ GTE Price Cap Case; *In the Matter of the Petition of Sprint Missouri, Inc. Regarding Price Cap Regulation Under RSMo Section 392.245 (1996)*, Case No. TO-99-359.

²⁰ GTE Price Cap Case, at pp. 3-4.

Provide Basic Local Exchange Telecommunications Service for both Universal and MSDT (Appendices 1 and 2 to ALLTEL's Notice of Election), the orders state that the respective companies are "granted a certificate of service authority to provide basic local telecommunications service in the state of Missouri" Indeed, in the Universal Order, the Commission had previously recited as a specific finding of fact that "Universal Telecom proposes to provide prepaid basic local telecommunications service on a resold basis." (Order, p. 3). However, as consistent with the other eighty-plus competitive local exchange telecommunications provider certificates, neither Universal nor MSDT was granted a certificate to provide "resold" or even "prepaid" telecommunications service; rather, they were granted certificates of service authority to provide basic local telecommunications services in the state of Missouri.

Staff is well aware that the Commission has never made any distinction in the certificates granted to providers and, in fact, in the briefs filed by the Staff in the Southwestern Bell Price Cap Case, the Staff's position was completely opposite to the position now espoused in its Motion. In the Initial Brief of Staff in Case No. TO-907-397, the Staff stated, "There is no distinction in this definition [Section 392.245.2] between a facilities-based versus reseller provider, only that there be a certificate to provide 'basic or non-basic local telecommunications service'".²¹ In its Report and Order in that case, the Commission stated:

[N]owhere in Section 392.245 is there a requirement that the alternative local exchange telecommunications company be facilities-based rather than a reseller before price cap regulation can be employed. "[C]ourts must construe a statute as it stands, and must give effect to it as it is written. [A] court may not engraft upon the statute provisions which do not appear in explicit words or by implication from other language in the statute." The parties argument that

²¹ Initial Brief of Staff of the Missouri Public Service Commission, Case No. TO-97-397, p. 4. See also, Reply Brief of the Staff of the Missouri Public Service Commission, Case No. TO-97-397, pp. 1-2.

the language in Section 392.450.1 and 392.451.1 constitutes such an implication is not persuasive. These sections describe the certification process for the provision of basic local telecommunications service. Significantly, the statutes make no distinction in the requirements for facilities-based competitors and resellers. More importantly, Section 386.020(46) defines the resale of telecommunications service as “the offering *or providing* of telecommunications service primarily through the use of services or facilities owned or provided by a separate telecommunications company Thus, there is nothing to suggest that a reseller does not *provide* service to its customers.”²²

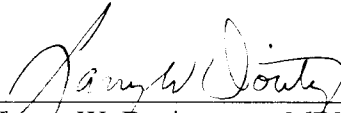
Nevertheless, under the guise that the “Commission requires flexibility in exercising its ratemaking function to deal with changing and unforeseen circumstances” (although never suggesting what those changing and unforeseen circumstances might be), the Staff now tries to change the plain language of the statute through strained interpretation and reach a result directly contrary to that reached in cases involving large companies, *supra*. The operative language of the statute is the same for both large and small local exchange companies, and for Staff to argue differently in this case involving a small local exchange company is arbitrary and discriminatory.

²² Southwestern Bell Price Cap Case, 6 Mo. P.S.C. 3d at 505.

Conclusion

For all the reasons stated above, ALLTEL Missouri, Inc. respectfully requests that the Commission deny the relief requested in Staff's Motion to Reject ALLTEL's Price Cap Election, and acknowledge that ALLTEL Missouri, Inc. is price cap regulated, having lawfully exercised its statutory right to elect to be so regulated under, and in conformance with, Section 392.245, RSMo 2000.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was hand-delivered, e-mailed or mailed, United States Mail, postage prepaid, this 26th day of March, 2004, to:

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